Supreme Court, U.S.
FILED
06-778 DEC 4 - 2006
OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

STEPHEN REMY MUELLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

Counsel of Record for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Are the federal Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums still mandatory?

PARTIES TO PROCEEDING IN NINTH CIRCUIT

The parties to the proceeding in the Ninth Circuit are the petitioner, Stephen Remy Mueller, and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen Remy Mueller ("Mueller"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on September 8, 2006.

OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit is reported at 463 F.3d 887 and is reprinted in the Appendix hereto. (P. 1a, *infra.*). No opinion was rendered by the district court. No order rendered by the district court is reported.

JURISDICTION

The judgment sought to be reviewed was entered on September 8, 2006. (P. 1a, *infra.*) The statutory provision believed to

confer on this Court jurisdiction to review the judgment in question on a writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

18 U.S.C. § 2252A

(a) Any person who—

. . . .

(2) knowingly receives . . . —

(A) any child pornography that has been . . . transported in interstate or foreign commerce by any means, including by computer; . . .

. . . .

shall be punished as provided in subsection (b).

(b)(1) Whoever violates . . . paragraph . . . (2) . . . of subsection (a) shall be . . . imprisoned not less than 5 years and not more than 20 years . . . .

18 U.S.C. § 3561(a)

A defendant who has been found guilty of an offense may be sentenced to a term of probation unless–

(1) the offense is a Class A or Class B felony and the defendant is an individual;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

U.S.S.G. § 5B1.1

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of § 5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

THE CASE

A. In the district court.

Mueller is charged with receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and receiving obscene visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 1466A(a)(1). (Excerpts of R. 1-2.) To the charge of receiving child pornography, Mueller pleaded guilty. (Excerpts of R. 25.) The charge of receiving obscene visual depictions of minors engaging in sexually explicit conduct was dismissed. (Excerpts of R. 25.)

The statute which Mueller violated provides:

> (a) Any person who—
>
> . . . .
>
> (2) knowingly receives . . .—
>
> (A) any child pornography that has been . . . transported in interstate or foreign commerce by any means, including by computer; . . .
>
> . . . .
>
> shall be punished as provided in subsection (b).
>
> (b)(1) Whoever violates . . . paragraph . . . (2) . . . of subsection (a) shall be . . . imprisoned not less than 5 years and not more than 20 years . . . .

(18 U.S.C. § 2252A.)

Mueller argued that the appropriate sentence is probation:

> MR. TRAPP: This has been . . . probably the most frustrating case of my career because of . . . the Draconian nature of the penalty for what my client has admitted to having done.
>
> . . . .
>
> As to the recommendation that's being made by the probation officer, . . . it says: "The defendant's crime occurs at the expense of innocent children whose lives are destroyed at the hands of those perpetrating deprivation and sexual exploitation."
>
> If my client had paid one penny to somebody for having these images available to him, I would have to concede that that would be the case. All he has done is gone on his computer, discovered that these things were available to look at, looked at them, downloaded them. There is no evidence or suggestion that he ever subscribed to these sort of things, there is no evidence to suggest that he solicited them in the sense of asking anybody to actually send them to him. They were just there, and he looked at them.

(Excerpts of R. 8-9.)

The district court concurred (Excerpts of R. 10 ("I think I would concur with you")), but in spite of that, it ruled that the "statute makes this . . . a crime with a mandatory minimum of five years" (Excerpts of R. 17) and sentenced Mueller accordingly. (Excerpts of R. 17.)

18 U.S.C. § 3553(c) provides, "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence[.]" For the sentence of five years, the district court gave only one reason. The only reason the district court gave was that five years is "required by the statute of conviction." (Excerpts of R. 17.)

Mueller moved for release pending appeal. (Excerpts of R. 19.) The motion was denied. (Excerpts of R. 20.) In denying the motion, the district court stated:

> THE COURT: Mr. Trapp, I'm not going to authorize bail pending an appeal. If you wish to appeal, I suggest you file your appeal right away so that it can be heard within a reasonable time. Clearly, the reason why I'm doing this is because . . . if there was not a mandatory minimum, I would be giving him some time in any event, I would not be giving him probation without time. So he may as well start serving his time.

(Excerpts of R. 20-21.)

Mueller appealed "the otherwise final sentence." (Excerpts of R. 31.)

B. In the Ninth Circuit.

The issue presented for review was whether a defendant who is convicted of receiving child pornography may be sentenced to a term of probation. (Br. of Def.-Appellant 2.)

18 U.S.C. § 3561(a) provides:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless–

> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

Mueller argued that he may be sentenced to a term of probation thereunder:

> (1) The offense at bar is neither a Class A nor a Class B felony. It is not specifically classified by a letter grade in the section defining it, and the maximum term of imprisonment authorized is "not more than 20 years." (18 U.S.C. § 2252A(b)(1).) "An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . less than twenty-five years but ten or more years, as a Class C felony[.]" (18 U.S.C. § 3559(a)(3).)
>
> (2) The offense at bar is not one for which probation has been expressly precluded. An example of an offense for which probation has been expressly precluded is 21 U.S.C. § 841(b)(1)(A): "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph." The section defining the offense at bar contains no such provision. At the most a preclusion is *implied.* "Implied" means "involved, suggested, or understood *without being openly or directly expressed.*" (*Webster's New World College Dictionary* 716 (4th ed. 1999)(emphasis added).)
>
> (3) Mueller was not scheduled to be sentenced at the same time for any other offense.

(Br. of Def.-Appellant 6-7(footnote omitted).)

Mueller also argued that a sentence of probation was no longer barred by the Sentencing Guidelines: "'[T]he guidelines do not authorize a sentence of probation.' (U.S.S.G. § 5B1.1, comment. (n.2).) This, however, is beside the point. The guidelines have become 'effectively advisory.' (*United States v. Booker*, 125 S.Ct. 738, 757 (2005).)" (Br. of Def.-Appellant 7-8.)

Finally, Mueller argued, "That the district court 'would be giving [Mueller] some time in any event, [that it] would not be giving him probation without time' (Excerpts of R. 20-21), is no obstacle to a sentence of probation: 'The court may provide, as further conditions of a sentence of probation, . . . that the defendant . . . (10) remain in the custody of the Bureau of Prisons during . . . intervals of time, totaling no more than . . . one year, during the first year of the term of probation.' (18 U.S.C. § 3563(b).)" (Br. of Def.-Appellant 8.)

The Ninth Circuit affirmed: "The district court was correct in interpreting § 2252(b) [sic] to require a mandatory minimum of five years incarceration, not to be substituted at the judge's discretion for an individually-tailored sentence that combines probation and a term of incarceration of less than five years." (P. 11a, *infra.*)

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH A RELEVANT DECISION OF THIS COURT.

A. The federal question.

Are the Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums still mandatory?

B. The Ninth Circuit has decided the federal question in a way that directly conflicts with a relevant decision of this Court.

The Ninth Circuit has decided the federal question in a way that directly conflicts with *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* this Court held that the Sentencing Guidelines are now advisory. (543 U.S. at 245.) In the case at bar the Ninth Circuit holds that the Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums are still mandatory:

> The question presented in this case is whether the district court is authorized to order probation under the probation statute, 18 U.S.C. § 3561, for a defendant convicted of receiving child pornography in violation of 18 U.S.C. § 2252 [sic], which provides for a mandatory minimum sentence of incarceration. Section 2252 [sic] establishes a mandatory minimum sentence of five years of incarceration but does not explicitly preclude probation. Probation is precluded for this conviction under the United States Sentencing Commission, *Guidelines Manual* ("U.S.S.G." or "Sentencing Guidelines"), and Mueller concedes that probation was not available as an alternative at the time of sentencing, when the district court was required to adhere to the Sentencing Guidelines. In the wake of *United States v. Booker*, 543 U.S. 220 (2005), however, the Sentencing Guidelines are no longer mandatory, and Defendant argues that nothing precludes the district court from imposing probation instead of the minimum mandatory sentence. We disagree. Because such an accidental byproduct of *Booker* would contradict clearly manifested congressional intent, we hold that probation is not available as an alternative and affirm the sentence imposed by the district court.
>
> . . . .

> Under the Sentencing Guidelines, probation is . . . precluded for offenses with mandatory minimums such as the one at issue here. *See* U.S.S.G. § 5B1.1. The Sentencing Guidelines provide that, subject to the restrictions in § 3561, a sentence of probation is authorized if the applicable guideline range is in Zone A or Zone B of the Sentencing Table. *Id.* § 5B1.1(a). Zone A deals with minimum terms of zero to six months, and Zone B deals with certain sentences having a term of up to twelve r onths. Accordingly, probation is precluded for offenses not within Zones A or B, subject to the restrictions of § 5B1.1.
>
> . . . .
>
> The sentencing regime we have now, after *Booker*, is a remedy created by the Supreme Court with the very purpose of giving effect to congressional intent embodied in the interrelated provisions of the complex sentencing structure. *See id.* at 248. Considering the potential remedial approaches, the Court explained, "we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Id.* at 247. The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

(Pp. 2a, 7a, 11a, *infra*.)

C. The federal question is important.

In consequence of *Booker*, the question presented for review will be implicated in countless determinations of sentence, in every federal district court.

D. The decision of the Ninth Circuit is otherwise erroneous.

The Ninth Circuit reasons:

> The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

(P. 11a, *infra*.) This, however, is unsound. The Ninth Circuit has chosen to recognize, as an *express* preclusion of probation, a preclusion which is only *implied*, and which is precluded *expressly* by nothing more than a now *advisory* Sentencing Guideline.

E. "Mandatory" minimum begs the question.

The Ninth Circuit uses the phrase "mandatory minimum sentence." (App. *passim*.) The word "mandatory," however, appears nowhere in 18 U.S.C. § 2252A. The modification of "minimum" by "mandatory" does nothing more than beg the question: it assumes as proved the very thing the Ninth Circuit is trying to prove.

F. A misapprenhension.

A point of fact is misapprehended by the Ninth Circuit. The decision states that "Mueller concedes that probation was not available as an alternative at the time of sentencing, when

the district court was required to adhere to the Sentencing Guidelines." (P, 2a, *infra.*) At the time of sentencing, however, the district court was not required to adhere to the Sentencing Guidelines, and Mueller does not concede otherwise. This Court decided that the Sentencing Guidelines are "effectively advisory" on January 12, 2005. (*Booker*, 543 U.S. at 220, 245 (2005).) The date on which Mueller was sentenced was March 2, 2005. (Excerpts of R. 5.) And at sentencing the attorney for Mueller said that

> as far as I can tell, this would seem to be somewhat of a question of first impression. The government hasn't found any case to the contrary. And I think that one reason, it is a case of first impression because it's driven to a certain extent by the very recent case, that decision of *Booker* in the Supreme Court of the United States, this question probably wouldn't have come up before, didn't come up before, because it is mooted and trumped by the Sentencing Guidelines, which were mandatory but which are now expressly advisory, according to *Booker*.

(Excerpts of R. 8-9.)

CONCLUSION

The Ninth Circuit has decided an important federal question in a way that directly conflicts with a relevant decision of this Court. Because of this, this petition should be granted.

Respectfully submitted,

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

December 4, 2006

Counsel of Record for Petitioner

APPENDIX

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 8, 2006]

No. 05-10180
D.C. No. CR-04-00044-RSL

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEPHEN REMY MUELLER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Guam
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 22, 2005—Honolulu, Hawaii

OPINION

Before: Myron H. Bright,* M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Clifton

---

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Howard Trapp (argued), Howard Trapp Incorporated, Hagåtna, Guam, for the defendant-appellant.

Leonardo M. Rapadas, United States Attorney, Districts of Guam and the NMI; Karen V. Johnson (argued), Assistant United States Attorney, Hagåtna, Guam, for the plaintiff-appellee.

OPINION

CLIFTON, Circuit Judge:

The question presented in this case is whether the district court is authorized to order probation under the probation statute, 18 U.S.C. § 3561, for a defendant convicted of receiving child pornography in violation of 18 U.S.C. § 2252, which provides for a mandatory minimum sentence of incarceration. Section 2252 establishes a mandatory minimum sentence of five years of incarceration but does not explicitly preclude probation. Probation is precluded for this conviction under the United States Sentencing Commission, *Guidelines Manual* ("U.S.S.G." or "Sentencing Guidelines"), and Mueller concedes that probation was not available as an alternative at the time of sentencing, when the district court was required to adhere to the Sentencing Guidelines. In the wake of *United States v. Booker*, 543 U.S. 220 (2005), however, the Sentencing Guidelines are no longer mandatory, and Defendant argues that nothing precludes the district court from imposing probation instead of the minimum mandatory sentence. We disagree. Because such an accidental byproduct of *Booker* would contradict clearly manifested congressional intent, we hold that probation is not available as an alternative and affirm the sentence imposed by the district court.

I. Background

Defendant Stephen Mueller pleaded guilty to the charge of receiving child pornography in violation of 18 U.S.C.

§ 2252(a).[1] That offense carries a mandatory minimum sentence of five years incarceration, as set forth in 18 U.S.C. § 2252(b).[2]

Before the district court, Mueller argued that the court had discretion, under 18 U.S.C. § 3561(a), to impose a sentence of probation notwithstanding the mandatory minimum, because § 2252 does not contain language expressly precluding that sentencing option. The district court interpreted the mandatory minimum language to preclude probation and to require incarceration for a term of at least five years, and sentenced Mueller to a term of five years, followed by three years of supervised release. Mueller timely appealed, asking us to reverse the sentence in order to give the court an opportunity to exercise its discretion to impose a sentence of probation instead.

II. Discussion

A. The probation statute

Despite the five-year mandatory minimum sentence required by § 2252(b), Mueller argues that the court may in-

---

[1] Section 2252(a) provides in relevant part: Any person who . . .

. . .

knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

. . .

the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct

. . .

shall be punished in accordance with subsection (b) of this section.

[2] Section 2252(b) provides in relevant part: "Whoever violates . . . subsection (a) . . . shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . ."

stead impose a sentence of probation under § 3561(a), which provides that:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
>
> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

The way the probation statute is written does suggest, as Mueller argues, that in all other circumstances not listed, probation is available. The government acknowledges that the first and third limitations in the probation statute do not apply to Mueller or his offense: the offense is not a Class A or Class B felony, and Mueller was not necessarily going to be sentenced at the same time to a term of imprisonment. The harder question here is whether Mueller was convicted of "an offense for which probation has been expressly precluded." We conclude that the answer to that question is yes, and thus that Mueller is not eligible for a sentence of probation as an alternative to the five-year minimum term of imprisonment.

B. Preclusion of probation

Mueller's position finds some support in this court's interpretation of the predecessor to the current probation statute. We held that under 18 U.S.C. § 3651, the earlier probation statute (repealed 1987), a defendant convicted of violating a statute which provided for a mandatory minimum sentence could still be placed on probation, with his sentence suspended, or could be made eligible for immediate parole.[3]

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[3] Section 3651 provided in relevant part:

United States v. Wilson, 506 F.2d 521, 522 (9th Cir. 1974). Similarly, in *Rodriguez v. United States*, 480 U.S. 522, 526 (1987), the Supreme Court held that the addition of language creating a "mandatory minimum" prison sentence did not repeal by implication the court's discretionary authority to suspend a sentence under § 3651, in the absence of more specific language precluding suspension of sentence or probation.

The current statute, § 3561(a), differs from its predecessor in that it does not give the sentencing court broad authority to "*suspend* the imposition or execution of sentence." 18 U.S.C. § 3651 (emphasis added). Under the new statutory scheme, instead of representing a suspension of the execution of a sentence, probation constitutes a type of sentence in and of itself. *See* 18 U.S.C. § 3561(a) ("A defendant who has been found guilty of an offense may be *sentenced* to a term of probation".) (emphasis added); *United States v. Granderson*, 511 U.S. 39, 43 n.3 (1994) ("The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence."); S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182 3271 (Aug. 4, 1983) ("Proposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence"). This revision is significant because the status of probation as a suspension of sentence, rather than an independent sentence, was crucial to the Supreme Court's original holding that mandatory minimums did not bar probation under the old regime. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (finding no irreconcilable conflict between a minimum sentence and the "suspension authority" of section 3651).

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

The shift in probation's character from representing a suspension of sentence to being the actual sentence is also significant because the revised probation sentencing authority necessarily interrelates with the regime of the Sentencing Guidelines as a whole, to which the probation statute belongs. The current probation statute was enacted (and the former provision repealed) as part of a broad reform of federal sentencing that included establishment of the Sentencing Guidelines and the abolition of parole. *See* S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3272 n. 316 (Aug. 4, 1983) (explaining that, with regard to offenses for which the imposition of a sentence of probation is specifically precluded under subsection (a)(2), "[t]he Committee believes that for most offenses the Sentencing Guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation"). Thus, although like the prior version the current statute purports to create "no presumption for or against probation," S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182, 3273, its reference to probation preclusion incorporates congressional intent regarding specific offenses, expressed elsewhere in the larger sentencing framework. Congress has precluded probation as an alternative sentence for this offense.

The current probation statute has never been the sole source of authority as to whether probation may be imposed. *See, e.g., United States v. Green*, 105 F.3d 1321, 1324 (9th Cir. 1997) (looking to both the offense statute itself and the Sentencing Guidelines to determine whether a sentence of probation was available, even where the offense statute contained express language precluding probation); *United States v. Mondello*, 927 F.2d 1463, 1468 (9th Cir. 1991) (rejecting the argument that by specifying only "certain serious crimes for which probation would be unavailable," Congress meant to permit probation for most of the unenumerated crimes, citing *United States v. Belgard*, 894 F.2d 1092, 1099 (9th Cir.

1990)); *see also United States v. Martinez-Cortez*, 924 F.2d 921, 923 (9th Cir. 1991) ("The legislative history of the Sentencing Reform Act . . . indicates that Congress did not intend 18 U.S.C. § 3561 to require that probation be available to all categories of defendants not stripped of that remedy by the section.") Class A and Class B felony offenses are specifically precluded under § 3561(a)(1), but they are not the only offenses for which probation is precluded.

Under the Sentencing Guidelines, probation is also precluded for offenses with mandatory minimums such as the one at issue here. *See* U.S.S.G. § 5B1.1. The Sentencing Guidelines provide that, subject to the restrictions in § 3561, a sentence of probation is authorized if the applicable guideline range is in Zone A or Zone B of the Sentencing Table. U.S. S.G. § 5B1.1(a). Zone A deals with minimum terms of zero to six months, and Zone B deals with certain sentences hav-ing a term of up to twelve months. Accordingly, probation is precluded for offenses not within Zones A or B, subject to the restrictions of § 5B1.1.

Congress has also precluded probation in the language of certain criminal offense statutes themselves. *See, e.g.*, 18 U.S.C. § 844(h) (imposing a mandatory minimum and adding "[n]otwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person" so convicted); 18 U.S.C. § 924(c)(1) (same); 21 U.S.C. § 841(b)(1)(A) (same).

Mueller points out that not every offense statute that carries a mandatory minimum contains accompanying language precluding probation. *See* 8 U.S.C. §1324(2)(B); 18 U.S.C. § 2252(b). This distinction does not, however, indicate that a probation alternative remains available for those offenses that do not contain such express preclusion language.

The legislative history of the offense statutes that preclude probation in the statute itself—*i.e.*, § 844(h) and § 924(c)(1)

—reveals that all of the provisions containing language expressly prohibiting probation were enacted before the Sentencing Reform Act created the Sentencing Guidelines, which became effective November 1, 1987. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 922, 957 (1970) (enacting 18 U.S.C. § 844(h), modeled after Gun Control Act of 1968, Pub. L. 90-618, § 102, 82 Stat. 1213 (1968) which enacted 18 U.S.C. 924(c)(1)(A)-(D)); *see also* Narcotics Penalties and Enforcement Act of 1986, Pub. L. 99-570, § 1002, 100 Stat. 3207 (1986). By compelling contrast, the mandatory minimum sentence provision of § 2252 was enacted at a time when the Sentencing Guidelines were in place and were binding on district courts, as was § 1324(2)(B)(ii). *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, § 103, 117 Stat. 650, 653 (2003) (increasing penalties and creating mandatory minimum under § 2252); Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 203, 110 Stat. 3009, 3009-566 (1996) (adding mandatory minimum penalty for violations of 8 U.S.C. § 1324). In light of the chronological legislative context (contrasting pre- and post-Sentencing Guidelines legislation), all that can be read into mandatory minimum sentencing provisions that are unaccompanied by extra express language precluding probation is that such extra language was not needed; probation was precluded under the Sentencing Guidelines structure. *See Green*, 105 F.3d at 1324 (9th Cir. 1997) ("Two provisions in the Guidelines themselves clarify that a sentence of probation is impermissible for the crime committed").

Mueller posits that since the Sentencing Guidelines are no longer mandatory and thus no longer restrict the full scope of § 3561, district judges are now free to decide if probation is appropriate for convictions under statutes that contain mandatory minimums but no express language precluding probation. In doing so, Mueller relies heavily on the probation statute

itself and what its drafters might have contemplated in the absence of the Sentencing Guidelines. His reliance is misplaced, however, because he ignores the sentencing provision of the *offense* statute and what its drafters quite clearly contemplated in the presence of the Sentencing Guidelines. There is no question that Congress was aware of and relied upon the Sentencing Guidelines' circumscription of probation authority when enacting the mandatory minimum sentence at issue in this case.

To begin with, Congress is presumed to have acted with awareness of the relevant legal context when it passes legislation. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). In the context of this offense statute, moreover, Congress articulated its specific intent to remove discretion from sentencing judges to depart downward from the minimum sentence. The minimum sentencing provision was first added in 2003 as part of the PROTECT Act, which increased penalties for crimes involving the child pornography industry. *See* PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. 650, 653; S. Rep. 108-2, 10 (2003) (Senate Report regarding the PROTECT Act). The Act not only created a mandatory minimum for this offense, but further limited discretion to depart downward from the Guidelines. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667-8 (amending 18 U.S.C. § 3553). While the wisdom of such a step away from judicial discretion (under a binding or advisory guidelines system) may be debatable, the legislative intent to do so with regard to this offense is not. *See* 149 Cong. Rec. S5113, S5121-22 (Apr. 10, 2003) (remarks of Sen. Hatch on the PROTECT Act) ("the game is over for judges . . . you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here.").[4] Such a deliberate legisla-

[4] It is important to note that although *Booker* directly struck down the PROTECT Act's addition of a *de novo* standard of review for departures

tive action should only be set aside by this court if required under the law. *Booker* does not create such a condition.

C. *Booker* does not require disregard of congressional intent here

As this appeal originates out of the practical impact of the *Booker* decision, it is worth emphasizing that the constitutional issues in that case did not involve mandatory minimum sentences. *See United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005) ("*Booker* does not bear on mandatory minimums"). As is familiar by now, in *Booker* the Supreme Court applied its decisions in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), to the Sentencing Guidelines and held that the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing beyond a reasonable doubt. *Booker*, 543 U.S. at 244. Having found a constitutional defect in the Guidelines as enacted, which allowed for sentence enhancements based on facts found by a preponderance of evidence by a judge, the Court evaluated potential remedies and concluded that the one most consistent with congressional intent would be to excise the provision that made the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp. 2004). *Id.* at 244-46.

Although we currently understand and interpret the Sentencing Guidelines as advisory rather than mandatory, that is not the way Congress understood the Sentencing Guidelines at the time it enacted a mandatory minimum sentence—which at that time, precluded probation—for violations of § 2252. Of course, even under the post-*Booker* sentencing regime, district courts must still consult the Sentencing Guidelines and take them into account, *see* 18 U.S.C. § 3553(a)(4); *Booker*, 543 U.S. at 246, so it is not as if the Sentencing Guideline provisions that add explicit limitations on proba-

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from the Sentencing Guidelines range, *see Booker*, 543 U.S. at 261, that provision is not the aspect of the PROTECT Act under review here.

tion have disappeared. Nor are those provisions constitutionally problematic. *See Booker*, 543 U.S. at 258 ("Most of the statute is perfectly valid.").

The sentencing regime we have now, after *Booker*, is a remedy created by the Supreme Court with the very purpose of giving effect to congressional intent embodied in the interrelated provisions of the complex sentencing structure. *See id.* at 248. Considering the potential remedial approaches, the Court explained, "we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Id.* at 247. The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

III. Conclusion

Where we are faced with a clear congressional mandate, as we are here, we can see no justification for using the *Booker* remedy (rendered according to a constitutional holding unrelated to the issue before us) to subordinate a legitimate legislative action to the law of unintended consequences. The district court was correct in interpreting § 2252(b) to require a mandatory minimum of five years incarceration, not to be substituted at the judge's discretion for an individually-tailored sentence that combines probation and a term of incarceration of less than five years. Accordingly, the judgment is affirmed.

AFFIRMED.

(2)

No. 06-778

Supreme Court, U.S.
FILED
MAR 23 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

STEPHEN REMY MUELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), which imposes a five-year mandatory minimum term of imprisonment for receiving child pornography, is advisory in light of *United States* v. *Booker*, 543 U.S. 220 (2005), such that a court may now impose a sentence of probation.

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In the Supreme Court of the United States

No. 06-778

STEPHEN REMY MUELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 463 F.3d 887.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2006. The petition for a writ of certiorari was filed on December 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Guam to one count of receiving child pornography, in violation of 18 U.S.C.

2252A(a)(2)(A).[1] Pet. App. 2a-3a. He was sentenced to five years of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. *Id.* at 11a.

1. Between May 10 and 19, 2004, petitioner used his office computer to access and download digital images depicting child pornography. Presentence Report para. 6 (PSR). A co-worker, using petitioner's computer, followed a suspicious link and discovered a web site promoting child pornography and featuring an image of an underage girl in a lace nightgown. *Id.* para. 13. The co-worker asked a network administrator to make a copy of the hard drive and surrendered the original to federal agents. *Id.* para. 14. An inspection of the hard drive revealed that petitioner had entered terms like "little Lolita girls" into Internet search engines, *id.* para. 19, and the temporary Internet files on the hard drive included banner ads for sites like "Child-Galaxy," which advertises pictures of "Little Girls 6-14 yo." *Id.* para. 17. Unallocated clusters on the hard drive contained "numerous other photos of pre-pubescent girls in various poses, exposing their genital areas in a lewd and lascivious manner and engaging in sexual activity with adult males." *Ibid.* Investigators ultimately discovered more than 500 images of child pornography on petitioner's hard drive. *Id.* para. 27.

Petitioner pleaded guilty to one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A). As part of his plea agreement, he admitted that he received and possessed digital images of mi-

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[1] A second charge, of receiving obscene visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 1466A(a)(1) (Supp. IV 2004), was dismissed pursuant to the plea agreement. PSR para. 4.

nors that had traveled in interstate or foreign commerce, knowing those images constituted or contained child pornography. The images depicted graphic intercourse, lascivious simulated sexual intercourse where the genitals, breast or pubic area of the minor was exhibited, and graphic or simulated lascivious exhibition of the genitals or pubic area of minors. Petitioner admitted saving the images on his computer for review at a later time. PSR para. 6.

Petitioner was sentenced several months after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). His PSR calculated a sentencing range of 46 to 57 months of imprisonment under the advisory Sentencing Guidelines. PSR para. 84. Under 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), however, a first-time offender who knowingly receives child pornography "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years." Accordingly, the statutory minimum sentence of five years became the guideline sentence. *Id.* paras. 83, 85 (citing United States Sentencing Guidelines § 5G1.1(b) (Guidelines)). The PSR stated that "[p]robation is not authorized as the statute sets a mandatory minimum sentence of five years, therefore, the statute expressly precludes a sentence of probation. *Id.* para. 89 (citing 18 U.S.C. 3561(a)(2)).

Before the district court, petitioner asked for a sentence of probation, arguing that he had not paid anyone for the images he downloaded. PSR Addendum 1; Pet. 4. The court held that the mandatory minimum sentence of five years, set forth in 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), prohibited a sentence of probation. Pet. App. 3a. The court also denied petitioner's motion for release pending appeal, explaining that "[c]learly, the reason

why I'm doing this is because * * * if there was not a mandatory minimum, I would be giving him some time in any event, I would not be giving him probation without time. So he might as well start serving his time." E.R. 20-21.

2. On appeal, petitioner argued that he was eligible for a sentence of probation because his offense did not satisfy any of the exceptions set forth in Section 3561(a), which provides that:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
>
> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

18 U.S.C. 3561(a). Because petitioner was convicted on only one count of receiving child pornography, a Class C felony, PSR para. 83, subsections (1) and (3) of Section 3561(a) do not preclude a sentence of probation. Petitioner argued that, notwithstanding the five-year statutory minimum sentence, Section 2252A(b)(1) does not "expressly preclude[]" a sentence of probation within the meaning of Section 3561(a)(2), pointing to several criminal statutes that specifically address the availability of probation. See, *e.g.*, 18 U.S.C. 2332b(c)(2) ("Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section."). Petitioner conceded that the Sen-

tencing Guidelines do not authorize a sentence of probation for his offense of conviction, compare PSR para. 84 (noting that "the applicable guideline range is in Zone D of the Sentencing Table"), with Guidelines § 5B1.1(a) comment. (n.2) (authorizing parole only when the Guidelines sentencing range falls in Zones A or B), but emphasized that *Booker* had rendered the Sentencing Guidelines advisory.

The court of appeals disagreed, holding that petitioner had committed an offense "for which probation has been expressly precluded" within the meaning of Section 3561(a)(2). Pet. App. 4a. It acknowledged that some criminal statutes preclude probation with more explicit language than Section 2252A. *Id.* at 7a-8a (citing 18 U.S.C. 844(h), 924(c)(1)). It noted, however, that those statutes predated the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 211, 98 Stat. 1837, which created the United States Sentencing Commission and called for the promulgation of federal sentencing guidelines. "By compelling contrast," the court of appeals found, when Section 2252A was amended the Sentencing Guidelines "were in place and were binding on district courts," and precluded probation under these circumstances. Pet. App. 8a.[2] Based on this "chronological legislative context," the court of appeals found it "quite clear[]" that Congress intended to preclude a sentence of parole for receiving child pornography. *Id.* at 8a-9a. Indeed, one of the central aims of the Prosecuto-

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[2] Congress enacted Section 2252A(b)(1) in 1996, see Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a) [Tit. I, § 121], 110 Stat. 3009-26, and added the five-year mandatory minimum sentence for receiving child pornography in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 103(a)(3)(D), 117 Stat. 653.

rial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, was to set higher statutory minimum sentences for child pornography offenses and "to remove discretion from sentencing judges to depart downward from the minimum sentence." Pet. App. 9a.

The court of appeals also rejected petitioner's reliance on *United States* v. *Booker*, 543 U.S. 220 (2005). That decision held that the mandatory Sentencing Guidelines violated the Sixth Amendment, but did not question the constitutionality of statutory minimum sentences and rendered the Guidelines advisory only because that remedy was "the one most consistent with congressional intent." Pet. App. 10a (citing *Booker*, 543 U.S. at 244, 246). The court of appeals took a similar approach, finding an "express preclusion of probation" in an attempt to "honor congressional intent in this context." *Id.* at 11a. To do otherwise, the court of appeals recognized, would defy "a clear congressional mandate" and would "subordinate a legitimate legislative action to the law of unintended consequences." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-11) that the remedial holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory, permits district courts to impose a sentence of probation instead of a mandatory minimum term of imprisonment required by statute. The court of appeals correctly rejected that argument, and no court of appeals has ruled otherwise. A criminal statute that directs the court to impose a minimum term of imprisonment "expressly preclude[s]" a sentence of probation within the meaning of 18 U.S.C. 3561(a)(2). The advisory Guidelines regime installed by

Booker does not authorize courts to disregard mandatory minimum terms directed by Congress. Further review by this Court is unwarranted.

Petitioner was convicted under Section 2252A(b)(1), which provides that first-time offenders who knowingly receive child pornography "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years." 18 U.S.C. 2252A(b)(1) (Supp. IV 2004). That language expressly precludes a sentence of probation because it provides that the defendant "shall be * * * imprisoned" for at least five years. Under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, a sentence of imprisonment necessarily precludes a sentence of probation. See 18 U.S.C. 3551(b) (providing that individuals found guilty of an offense "shall be sentenced * * * to" (1) "a term of probation," (2) "a fine," or (3) "a term of imprisonment," and specifying that fines, forfeiture, notice to victims, and restitution may be imposed in addition to the required sentence); 28 U.S.C. 994(a)(1)(A) (directing the Sentencing Commission to promulgate guidelines for use by sentencing courts in "determin[ing] whether to impose a sentence to probation, a fine, or a term of imprisonment"); *Booker*, 543 U.S. at 258 (noting that Section 3551, which "describ[es] authorized sentences as probation, fine, or imprisonment," remains "perfectly valid"); *United States* v. *Granderson*, 511 U.S. 39, 43 n.3 (1994) ("The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence."); Pet. App. 5a.

Petitioner notes (Pet. 6) that several criminal statutes preclude a sentence of probation by literally referring to a prohibition against probation. See, *e.g.*, 21 U.S.C. 841(b)(1)(B) (2000 & Supp. IV 2004) ("Notwithstanding any other provision of law, the court shall not

place on probation or suspend the sentence of any person sentenced under this subparagraph.").[3] He argues that, as a consequence of Section 3561(a), any statute that calls for a mandatory minimum prison term without using comparable language permits a sentence of probation. No court has accepted petitioner's novel theory of Section 3561(a), see Pet. 11 (characterizing the issue as a "question of first impression"), and the court of appeals correctly rejected it. See Pet. App. 11a (declining to construe Section 2252A(b) in a manner that would cause "unintended consequences"). The availability of explicit language that precludes probation does not mean that Congress failed to expressly preclude a sentence of probation in Section 2252A(b)(1), which unequivocally requires a term of imprisonment of at least five years. Many federal criminal statutes impose "mandatory minimum" prison sentences. *Harris* v. *United States*, 536 U.S. 545, 569-570 (2002) (Breyer, J., concurring). In a system that treats imprisonment and probation as mutually exclusive sentences, a mandatory minimum term of imprisonment "expressly" precludes probation within the meaning of Section 3561(a)(2).

By contrasting Section 2252A(b)(1) with other criminal statutes that contain an express statement about probation, petitioner imputes to Congress a conscious decision to permit a sentence of probation as punishment for transporting, producing, receiving, or distributing child pornography. The court of appeals correctly

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[3] Congress has used similar language for offenses involving explosives, 18 U.S.C. 844(h); firearms, 18 U.S.C. 924(c)(1)(D)(i); armor-piercing ammunition, 18 U.S.C. 929(b); and acts of terrorism, 18 U.S.C. 2332b(c)(2); as well as drug import and export offenses, 21 U.S.C. 960(b)(1) (2000 & Supp. IV 2004); and drug offenses within federal prisons, 42 U.S.C. 14052(c).

rejected that suggestion as inconsistent with legislative intent. Pet. App. 9a-10a. One of the central goals of the PROTECT Act, which added the five-year mandatory minimum to Section 2252A, was to limit sentencing courts' discretion to impose light sentences for offenses involving child exploitation. *Id.* at 9a; S. Rep. No. 2, 108th Cong., 1st Sess. 19 (2003) (describing PROTECT Act provisions "designed to increase jail sentences in cases where children are victimized by sexual predators" and to impose "tough, mandatory minimum sentences"); H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 51 (2003) (explaining that the PROTECT Act's "[i]ncreased mandatory minimum sentences are responsive to real problems of excessive leniency in sentencing under existing law"). As the court of appeals recognized (Pet. App. 11a), permitting a sentence of probation for a violation of Section 2252A(a)(2) would contravene "a clear congressional mandate."

Petitioner's reliance (Pet. 7) on *Booker*, 543 U.S. at 245, is misplaced. Petitioner does not invoke the merits holding of *Booker*, *viz.*, that mandatory Sentencing Guidelines violated this Court's "bright-line rule" that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham* v. *California*, 127 S. Ct. 856, 868 (2007) (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). Rather, he relies on the remedial holding of *Booker*, *viz.*, that the Guidelines are now "effectively advisory." *Booker*, 543 U.S. at 245. That holding means that, to the extent that the Sentencing Guidelines prohibited sentences of probation otherwise authorized by statute, that limitation is no longer mandatory. But *Booker* had no effect on *statutory* man-

datory minimum sentences or *statutory* preclusions of probation. *Booker* severed only two provisions of the Sentencing Reform Act of 1984: 18 U.S.C. 3553(h) and 3742(c). 543 U.S. at 245. It did not alter independent statutory sentencing provisions. Indeed, even when the Guidelines were mandatory, they did not authorize courts to disregard a statutory minimum term of imprisonment and impose a sentence of probation. The same is true today. See, *e.g.*, *United States* v. *Duncan*, 413 F.3d 680, 683-684 (7th Cir. 2005) (*Booker* had no effect on statutory mandatory minimum sentences and, in ordering resentencing under advisory Guidelines, stating that "the district court still would have no discretion to sentence [the defendant] on the firearm offense to less than the statutory thirty-year minimum"); *United States* v. *Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (ordering resentencing under advisory Guidelines, but "emphasiz[ing] that the district court was, and still is, bound by the statutory minimums").[4] Because the remedial holding of *Booker* had no effect on statutory mandatory minimums, it did nothing to alter the express statutory preclusion of probation as a sentence for receiving child pornography under Section 2252A(a)(2).

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[4] Congress has authorized district courts to sentence below the statutory minimum in only two circumstances, both expressly set forth in 18 U.S.C. 3553 (2000 & Supp. IV 2004). First, Section 3553(e) grants courts a "[l]imited authority to impose a sentence below a statutory minimum" upon the government's motion, where the defendant has provided "substantial assistance in the investigation or prosecution of another person." 18 U.S.C. 3553(e) (2000 & Supp. IV 2004). Second, Section 3553(f), the so-called "safety valve" provision, directs courts to impose a sentence "without regard to any statutory minimum sentence" for certain drug offenses, provided the defendant satisfies various criminal history and offense conduct requirements. 18 U.S.C. 3353(f).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

LOUIS M. FISCHER
Attorney

MARCH 2007

(3)

No. 06-778

FILED
MAR 3 0 2007
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

Counsel of Record for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

In its brief in opposition, the Government cites footnote 3 of *United States v. Granderson*, 511 U.S. 39 (1994): "See . . . *United States v. Granderson*, 511 U.S. 39, 43 n.3 (1994)('The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence.') . . . ." (Br. in Opp'n 7.) In footnote 3 of *Granderson*, the Court cites Senate Report No. 98-225 (1983): "See S. Rep. No. 98-225, p. 88 (1983)." *(Granderson*, 511 U.S. at 43 n.3.) *Senate Report No. 98-225 (1983) draws a clear distinction between an offense for which probation has been expressly precluded, on the one hand, and a statutory minimum sentence, on the other.* On the one hand, it says that "under subsection (a)(2) [of 18 U.S.C. § 3561], probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is *specifically*

precluded." (S. Rep. No. 98-225, at 89 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3272.) On the other hand, in a footnote to the statement that "under subsection (a)(2) [of 18 U.S.C. §3561], probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded," it says, "The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws." (*Id.* at n.194.) Accordingly, it is clear that the offense at bar is not one for which probation is expressly precluded, and the petition for a writ of certiorari should be granted.[1]

Respectfully submitted,

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

Counsel of Record for Petitioner

[1] The Government concedes "that, to the extent that the sentencing guidelines prohibited sentences of probation otherwise authorized by statute, that limitation is no longer mandatory." (Br. in Opp'n 9.)